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No. 85-1707

In the Supreme Court of the United States

OCTOBER TERM 1985

VIOLA MOODY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly ruled that petitioners could not challenge, by way of a damage suit under the Federal Tort Claims Act, a regulation providing that inspections of homes by employees of the Farmers Home Administration are for the benefit of the government, not the borrower, and create no legal duty or obligation on behalf of the government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 774 F.2d 150; the order denying rehearing en banc (Pet. App. 35a) is unreported. The opinion of the district court in *Moody* v. *United States* (Pet. App. 17a-22a) is reported at 585 F. Supp. 286. The April 9, 1984 order of the district court in *Bawgus* v. *United States* (Pet. App. 25a), the magistrate's report and recommendation which the district court initially adopted (Pet. App. 26a-34a), and the district court's June 5, 1984 opinion (Pet. App. 23a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals in these consolidated cases was entered on October 8, 1985, and a petition for rehearing was denied on November 19, 1985 (Pet. App.

35a). On February 10, 1986, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 18, 1986, and the petition was filed on that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Farmers Home Administration (FmHA) is the federal agency authorized, under Title V of the Housing Act of 1949 (the Housing Act), 42 U.S.C. (& Supp. II) 1471 *et seq.*, to provide financial assistance to low-income rural residents, thereby enabling them to obtain "dwellings and related facilities for their own use" (42 U.S.C. 1471(a)(2)). Such assistance may be either by direct loans or by insured or guaranteed loans (42 U.S.C. (& Supp. II) 1472, 1487). To qualify for a loan, an applicant must demonstrate a lack of adequate housing, an insufficiency of resources to obtain housing on his own, and an inability to obtain credit at a reasonable rate from another source (42 U.S.C. 1471(c)). Under 42 U.S.C. 1476(a), "[b]uildings and repairs constructed with funds advanced pursuant to this subchapter shall be supervised and inspected as required by the Secretary [of Agriculture]." The regulations specify in detail the manner in which inspections shall occur (7 C.F.R. 1924.9) and provide for three stages of inspection: the initial inspection, the inspection prior to completion of the building structure, and the final inspection at the time the structure is ready for occupancy (7 C.F.R. 1924.9(b)).

The legislative history of the Housing Act states that "[t]he extent of the requirements for building plans, supervision, and inspection would depend upon the character of the construction and the amount of the loan" (S. Rep. 84, 81st Cong., 1st Sess. Pt. 2, at 20 (1949)). FmHA's former regulations implementing that congressional intent provided that "[s]upervision will be provided borrowers to the

extent necessary to achieve the objectives of the loan and to protect the interests of the Government" (7 C.F.R. 1822.7(a) (1979)). The regulations also provided that "[t]he United States (including FmHA) will not become a party to a construction contract nor incur any liability thereunder" (7 C.F.R. 1804.4(d) (1979)). See also 42 U.S.C. 1472(b) (Housing Act requires Secretary of Agriculture to protect government's security interest in property subject to FmHA housing loan).

The Department of Agriculture amended the FmHA regulations, effective June 12, 1980 (45 Fed. Reg. 39789). Specifically, the following pertinent provision was added (7 C.F.R. 1924.9(a)):

> FmHA's inspections are not to assure the borrower that the house is built in accordance with the plans and specifications. The inspections create or imply no duty or obligation to the particular borrower but are, rather, for the dual purposes of determining that FmHA has adequate security for its loan and enabling FmHA to determine that FmHA is working toward achieving the statutory goal of providing adequate housing.

The amended regulation further provides that final inspection will be made "to protect the security interest of the government" and that "[t]he borrower will be responsible for making inspections necessary to protect the borrower's interest" (*ibid.*). In addition, the amended regulation provides that "[t]he borrower should make enough periodic visits to the site to be familiar with the progress and performance of the work, in order to protect the borrower's interest" (7 C.F.R. 1924.9(b)(5)). The Department of Agriculture explained the changes as follows (45 Fed. Reg. 39792 (1980)):

> [E]xisting statutes provide for these construction inspections to be conducted by FmHA personnel solely to determine adequacy of the FmHA security. Language other than that contained in the final rule may create legal problems by not properly informing the public as to the purpose of these inspections.

Thus, the new regulations merely clarified preexisting law.

The Housing Act contains an administrative remedy for FmHA loan recipients whose homes are found to contain structural defects. Under the applicable provision, 42 U.S.C. 1479(c), enacted in 1977, the Secretary of Agriculture has authority either to make expenditures to correct such defects, to pay the owner for claims arising from such defects, or to buy the property.

2. Petitioners are low-income residents of two rural Tennessee counties who received loans from the FmHA under the Housing Act to construct homes. These loans were closed by FmHA following inspection of the homes by FmHA employees at various stages of construction. Promissory notes signed by each of the petitioners were explicitly made subject to existing FmHA regulations. Pet. App. 2a-4a.[1]

3. Subsequently, two groups of petitioners brought two separate damage suits against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671 *et seq.*, in the United States District Court for the Eastern District of Tennessee. These suits alleged that homes purchased with FmHA's assistance contained design and construction defects and that FmHA employees had been negligent in conducting the inspections of those homes. Petitioners' tort suits were not based on any alleged duty of

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[1]In the case of each petitioner, the promissory note was signed after June 12, 1980, the effective date of FmHA's amended regulation (Pet. App. 2a-4a, 12a, 20a, 23a).

lenders in general to inspect property before closing a loan. Instead, petitioners claimed that under the Housing Act and the applicable regulations, FmHA had voluntarily assumed a special duty to borrowers. In one of the cases, *United States* v. *Moody,* the district court granted summary judgment on behalf of the United States on the ground that 7 C.F.R. 1924.9(a) precluded the petitioners from relying on the FmHA inspections to protect their interests, and therefore prevented recovery as a matter of Tennessee law under the Good Samaritan doctrine (Pet. App. 17a-22a). In the second case, *Bawgus* v. *United States,* the district court initially accepted the magistrate's recommendation to deny the government's motion for judgment on the pleadings (Pet. App. 25a). Upon reconsideration, however, the court granted the motion on the ground that, in light of 7 C.F.R. 1924.9(a), the government owed no duty to the borrowers under the Good Samaritan doctrine (Pet. App. 23a-24a).

4. The court of appeals consolidated the two cases on appeal and affirmed in both cases (Pet. App. 1a-16a). The court initially determined that although no Tennessee court had expressly adopted the Good Samaritan doctrine, the principle was reflected in Tennessee tort law (Pet. App. 10a). The court stated, however, that "[t]he principal element in applying [the doctrine] is the plaintiff's reliance on the government's undertaking" (Pet. App. 12a) and that "[a]ppellants cannot premise liability on the voluntary undertaking represented by the regulations independent of the limitations expressly circumscribing that undertaking" (Pet. App. 13a). The court of appeals concluded that "the plain language of [7 C.F.R. 1924.9(a)] indicating that inspection is for the government's benefit precludes reasonable reliance by appellants on such inspection" (Pet. App. 13a). The court rejected petitioners' attempt to challenge the validity of 7 C.F.R. 1924.9, noting that "the FTCA itself

makes clear that an action for damages may not be premised on the invalidity of a regulation" (Pet. App. 13a n.9). The court also held that 7 C.F.R. 1924.9(a) precluded recovery by petitioners under the Tennessee doctrine of negligence *per se* because the regulations made clear that "the government rather than the borrower is the party which the regulations are intended to protect" (Pet. App. 15a).

ARGUMENT

The decision of the court of appeals was correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners' principal contention (Pet. 13-15) appears to be that the court of appeals erred in refusing, in a damage suit under the FTCA, to consider their challenge to the validity of 7 C.F.R. 1924.9(a), the regulation stating that inspections by FmHA are solely for the benefit of the government. That claim is without merit.

The FTCA provides a waiver of sovereign immunity for certain specified torts committed by federal employees. Section 2680 of the FTCA (28 U.S.C. 2680) contains various exceptions to that waiver. One exception provides that the waiver of sovereign immunity does not apply to "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid * * *" (28 U.S.C. 2680(a)).[2] As this Court and other courts have recognized, the main purpose of this

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[2]The second clause of 28 U.S.C. 2680(a) provides that the FTCA does not apply to suits based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." The applicability of that portion of 28 U.S.C. 2680(a) is not an issue before this Court.

exception was to preclude testing the legality of a statute or regulation by a tort suit. *Dalehite* v. *United States*, 346 U.S. 15, 27 (1953) (quoting legislative history); *Dupree* v. *United States*, 247 F.2d 819, 824-825 (3d Cir. 1957); *McMichael* v. *United States*, 521 F. Supp. 1273, 1280 (W.D. Ark. 1981), aff'd in part and rev'd in part on other grounds *sub nom. Madison* v. *United States*, 679 F.2d 736 (8th Cir. 1982); *Stewart* v. *United States*, 486 F. Supp. 178, 181 (C.D. Ill. 1980); *Avery* v. *United States*, 434 F. Supp. 937, 943 (D. Conn. 1977).

The interpretation of Section 2680(a) by the courts is strongly supported by the legislative history. Specifically, the legislative explanation of Section 2680(a), one that was repeated several times in committee reports, made clear that it was "[not] desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." H.R. Rep. 2245, 77th Cong., 2d Sess. 10 (1942); S. Rep. 1196, 77th Cong., 2d Sess. 7 (1942); H.R. Rep. 1287, 79th Cong., 1st Sess. 6 (1945). Based on Section 2680(a) and on Congress's clear intent, the courts have consistently concluded—as the court of appeals correctly did in this case (Pet. App. 13a n.9, 15a-16a n.13)—that the FTCA bars damage suits under the FTCA that are premised on the alleged invalidity of a statute or regulation. See, *e.g.*, *Dupree* v. *United States*, 264 F.2d 140, 142 (3d Cir.), cert. denied, 361 U.S. 823 (1959); *Dupree* v. *United States*, 247 F.2d at 824-825; *Powell* v. *United States*, 233 F.2d 851, 854-855 (10th Cir. 1956); *Smith* v. *United States*, 101 F. Supp. 87, 88 (D. Colo. 1951), appeal dismissed, 196 F.2d 222 (10th Cir. 1952).[3]

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[3]A significant parallel to Section 2680(a) can be found under the Administrative Procedure Act, 5 U.S.C. (& Supp. II) 551 *et seq.* Section 702 of that statute provides for a right of judicial review to individuals alleging to have suffered injury as a result of agency action (5 U.S.C. (Supp. II) 702). That provision, however, explicitly excludes judicial

2. Despite this clear congressional intent, as repeatedly recognized by the courts, petitioners maintain that the FTCA permits them to challenge the validity of 7 C.F.R. 1924.9(a) because they are claiming that the inspectors failed to exercise due care in performing under the regulations (Pet. 14). This interpretation of 28 U.S.C. 2680(a), however, would render that provision virtually nugatory. Simply by including in a lawsuit an allegation of lack of due care in the execution of a statute or regulation (an allegation that would normally be required to support a claim under the FTCA in any event), any litigant seeking civil damages under the FTCA could obtain judicial review of that statutory or regulatory provision. Such a result would completely undermine Congress's intent of precluding such review in a damage suit under the FTCA. See generally *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542-543 (1940). Petitioners do not cite a single case in which a court, in a damage suit under the FTCA, has interpreted 28 U.S.C. 2680(a) to permit judicial review of the legality of a statute or regulation. They certainly cannot point to any genuine conflict between the court of appeals' decision and any decision by this Court or another court of appeals.[4]

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review of the validity of agency action in the context of a suit for money damages. *Ibid.* The legislative history of that provision indicates that the limitation with respect to suits for money damages was intended to avoid expanding the availability of damages beyond the circumstances authorized by the FTCA. H.R. Rep. 94-1656, 94th Cong., 2d Sess. 4-5 (1976).

[4]In their "Questions Presented" (Pet. i), petitioners intimated that they would demonstrate a conflict between the court of appeals' decision and this Court's decision in *Block* v. *Neal*, 460 U.S. 289 (1983). No

If petitioners had a claim of lack of due care against the inspectors that did not depend for its success on the invalidity of 7 C.F.R. 1924.9, then the prohibition of 28 U.S.C. 2680(a) relating to acts in execution of a statute or regulation would not bar such a claim. Here, however, as the court of appeals correctly found (Pet. App. 10a-16a), petitioners' claims, which are premised on the "Good Samaritan" doctrine and the doctrine of negligence *per se*, cannot succeed under Tennessee law in light of FmHA's regulation providing that the inspections are not for the benefit of the borrowers. Accordingly, the court of appeals correctly affirmed the dismissal of the suits by the district courts.

3. Petitioners also try to avoid the mandate of 28 U.S.C. 2680(a) by contending that the inspectors were not acting "in execution of" the regulation at issue (Pet. 14-15). This argument is without merit. The regulation in question is part of a section entitled "Inspection of development work" (7 C.F.R. 1924.9). That section states, at the outset, that "[t]he following policies will govern the inspection of all development work" (*ibid.*). It then contains six subsections that outline those policies. The provisions at issue are part of subsections (a) and (b) (7 C.F.R. 1924.9(a) and (b)(5)) and are clearly integral portions of the regulations under which the inspector must operate. The inspectors were therefore clearly acting in execution of the regulation at issue. In any event, even if we assume *arguendo* that the regulation in question does not govern the conduct of the inspectors, petitioners' argument would be no more persuasive. Since Congress precluded judicial review, in an FTCA

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such conflict was ever identified, however (Pet. 9). Nor does it exist. *Block* v. *Neal* involved inspections that took place prior to the adoption of the amended regulation at issue here, and presented no challenge to the validity of any statute or regulation. The sole issue was whether the claim in that case was barred by the FTCA's exception for claims "arising out of * * * misrepresentation" (28 U.S.C. 2680(h)).

damage suit, of laws and regulations directly governing an employee's conduct, it precluded *a fortiori* judicial review of the countless laws and regulations that do not control such conduct.

4. Petitioners also challenge the court of appeals' reliance on the regulation in question on the ground that they were unaware of its existence (Pet. 17). The court of appeals was correct, however, in not examining whether the specific petitioners in fact knew about the regulation (Pet. App. 12a-13a). The promissory notes signed by the petitioners were explicitly made subject to existing FmHA regulations (Pet. App. 2a, 4a), which included 7 C.F.R. 1924.9(a) and (b)(5). The regulation in question was published in the Federal Register (45 Fed. Reg. 39803 (1980)), and petitioners thus received legal notice of it. As this Court had made clear, "[j]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947) (citations omitted). See also *Ramsey* v. *Farmers Home Administration*, 443 F. Supp. 760, 762 (E.D. Mo. 1978) (applying this rule to FmHA regulations); *Adamsville Lumber Co.* v. *Rainey*, 348 F. Supp. 373, 376 (W.D. Tenn. 1972) (same).

5. Although the court of appeals properly refused to reach the issue, we note further that petitioners are incorrect in claiming that 7 C.F.R. 1924.9(a) and (b)(5) are invalid. As discussed above (pages 2-4, *supra*), the regulations in existence prior to the enactment of 7 C.F.R. 1924.9(a) and (b)(5) revealed that inspections were to protect the government's financial interest. 7 C.F.R. 1822.7(a) (1979); 7 C.F.R. 1804.4(d) (1979). See *Ramsey* v. *Farmers Home Administration*, 443 F. Supp. at 762. That objective was evident from the legislative history of the Housing Act,

which indicated that the inspections were to be dependent on the size of the loan involved. S. Rep. 84, 81st Cong., 1st Sess. Pt. 2, at 20 (1949) (quoted on page 2, *supra*). Contrary to the petitioners' contention (Pet. 14-15), nothing in the statute or legislative history of the Housing Act explicitly provides that the inspection program is for the benefit of the loan recipient. The Secretary's amendment in June of 1980 was simply a clarification of prior law—namely, that inspections are solely to protect the government's financial interest.[5] Moreover, the Secretary's construction of the Housing Act does not leave individuals such as the petitioners without a remedy. As we discussed above, and as the court of appeals correctly noted (Pet. App. 16a n.14), the Housing Act provides an administrative remedy for FmHA loan recipients whose homes contain structural defects (42 U.S.C. 1479(c)). This remedy is designed precisely to provide compensation for claims such as those raised by the petitioners (albeit with federally-prescribed measures of damages, rather than the possibility of more open-ended relief that might arguably be available under the FTCA).[6] In short, petitioners' substantive challenge to the 1980 regulation is without merit, as well as not properly cognizable in this case.

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[5]The Housing Act grants the Secretary of Agriculture authority to "make such rules and regulations as he deems necessary to carry out the purposes of [the FmHA loan program]" (42 U.S.C. 1480(j)). The Secretary's interpretation of the Housing Act—and in particular, of the purpose of inspections—is reasonable and not in conflict with the expressed intent of Congress. It is, therefore, entitled to great weight. See, *e.g.*, *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843-845 (1984).

[6]As the government's brief to the Sixth Circuit revealed (U.S. Br. 6), the record shows that petitioner Moody had been offered compensation under the administrative remedy, including exchange of her home for another FmHA-financed residence and reimbursement of moving expenses. Moreover, while not reflected in the record, the government's

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JUNE 1986

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brief below further indicated that the *Bawgus* petitioners had pursued their administrative remedies; all but one of those petitioners had exchanged their dwellings for new residences and had received moving expenses and reimbursement of closing costs associated with the first dwelling (U.S. Br. 6 n.13). That information was obtained from the appropriate FmHA county supervisor and was confirmed by one of petitioners' attorneys below.